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Root, Elihu

Public service by the bar

[Philadelphia]

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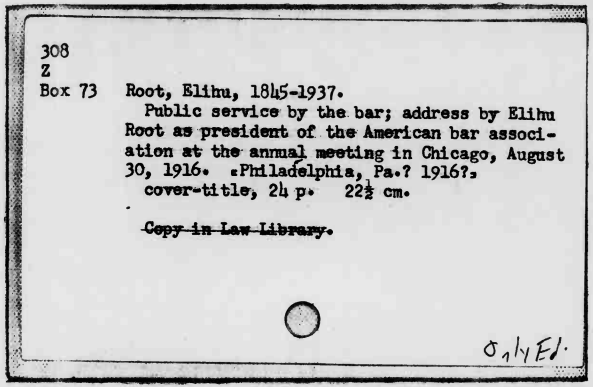

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Public Service By The Bar

Address By

ELIHU ROOT

As President of the American Bar Association at the Annual Meeting in Chicago

AUGUST 30, 1916

Sent out with the Compliments of George H. Paine, Philadelphia, Pa.

PUBLIC SERVICE BY THE BAR.

ADDRESS BY ELIHU ROOT AS PRESIDENT OF THE AMERICAN BAR ASSOCIATION AT THE ANNUAL MEETING IN CHICAGO, AUGUST 30, 1916.

One of the most striking effects of the great war is the extraordinary increase of national efficiency which has followed the spur of necessity. All over Europe among the struggling nations the virile and simple virtues have emerged from beneath habits of selfish indifference. Industry, inventive energy, thrift, self-denial, acceptance of discipline, subordination of individual preferences to the general judgment, loyalty to ideals, devotion to country and willingness to make sacrifices for her sake have become general. A new gospel of patriotic service has replaced the cynicism of privilege and personal advantage.

This change relates not merely to military efficiency but to the whole social economy and extends throughout the field of production and to all forms of consumption and waste. It carries a sense of individual responsibility by each citizen to help make his country strong by production and by conservation.

When the war is over we shall find ourselves in a very different world from that which witnessed the Austrian ultimatum to Servia. It will be a world in which the greater part of the nations return to the peaceful competition of production and commerce with a vast increase of power to compete caused by the training of hardship and sacrifice. Plainly, the neutral nations who have neither endured the sufferings nor achieved the rewards of this hard experience may not look with indifference upon these events.

26 March 1920 - E. R.

They should realize the increased efficiency which they will have to meet when they enter again upon the competition in which all civilized nations must engage. In the amazing developments of these years there are lessons for us to learn which we must not ignore. There are lessons not merely as to submarines and aeroplanes and high explosives, but as to the whole effective capacity of the nation by which it maintains its place and progress in the world in peace as in war. No human power can withhold the people of the United States from taking part in the international competition which will follow the return of peace. It is not a matter of volition. It cannot be controlled by legislation or by change of parties or by voting. The entire community of civilized nations is going through a phase of development from which no one of them can escape and continue to hold its own, and one of the necessary incidents of that development is competition in production and trade. The United States must therefore be prepared to meet competition carried on more effectively than ever before. The power of organization will be at its highest; the advantages of applied science will be greatest; the hindrances of internal misunderstanding and dissension will be at a minimum.

One of the most important features of the present European development for Americans to consider is the fact that it has been along the line of military organization and discipline. That surrender of individual liberty to superior control which is essential to the discipline and efficiency of an army has been extended to civil life and applied in governmental direction of productive industry, of transportation, and of consumption. The habits of communities accustomed to the least possible control over individual action proved wholly unfit in a sudden emergency to meet the military competition of highly disciplined masses. The question how far the abandonment of individualism and the establishment of rigid government control is to be con-

tinued or extended for purposes of efficiency in peaceful competition is of the highest interest and importance to us. This importance is quite independent of the question how far it is probable that we shall be required to defend our wealth and security against aggression by armed force.

In either view it is plainly the duty of all Americans, whatever their calling, to consider by what means they can contribute through either the increase or the conservation of power in their own fields of action, towards the permanent higher efficiency of the people of the United States.

There is no body of citizens to whom this duty should appeal more strongly than to the lawyers, because the subject vitally affects the relations between the individual and the state regulated by law and the fundamental conceptions upon which our system of government is based.

There are two relevant truths of universal application and appeal. One is, that the people of the United States need in one important respect a change of the individual attitude toward their government. Too many of us have been trying to get something out of the country and too few of us have been trying to serve it. Offices, appropriations, personal or class benefits, have been too generally the motive power that has kept the wheels of government moving. Too many of us have forgotten that a government which is to preserve liberty and do justice must have the heart and soul of the people behind it—not mere indifference. Too many of us have forgotten that not only eternal vigilance but eternal effort is the price of liberty. Our minds have been filled with the assertion of our rights and we have thought little of our duties. The chief element of strength which the nations of Europe are acquiring is the spirit of their people, who have learned a new loyalty of devotion and sacrifice for their country. In a world where that spirit prevails the United States will slip back in the race unless we, too, have a new birth of loyalty and devotion.

The second general truth is, that national strength requires the spirit of solidarity among the people of the nation. Sectional or class misunderstanding and hatred or dislike are elements of vital weakness. To be strong a nation's citizenship must be a title to friendship and kindly interest among all her citizens. In a strong nation her people will be one for all and all for one. Every part of a country grows stronger with the prosperity of every other part. National wealth and prosperity are made up of the wealth and prosperity of individuals, and we cannot pull down each other without suffering as a people. The rights and privileges, the property and liberty and life of every American, whether he be at home or in Mexico or in the Far East, on land or sea, are our concern and the concern of each of us. Prosperity to him is a benefit to us; misfortune to him is a loss to us; and it is vital to each one of us that we shall have such a country and such a government as shall put power and prestige and honor and active interest and inflexible resolution into the protection of every American whose necessities may come by circumstances to demand the performance of his nation's duty. Whenever a part of a people give themselves up to envy and jealousy of another part that may seem more prosperous, whenever a part of a people seek to equalize conditions by pulling down rather than by building up, the power of the nation begins to wane and the forces which should make the nation great and effective are impaired and wasted by internal controversy and diminished patriotism.

When we turn to the particular field occupied by our profession we cannot fail to see that our country would be made stronger if we could change some characteristics in our administration of the law.

There is great economic waste in the administration of the law viewed from the standpoint of the nation and of the states. There is unnecessary expenditure of wealth and of effective working power, in the performance of this par-

ticular function of organized society. We spend vast sums in building and maintaining court houses and public offices and in paying judges, clerks, criers, marshals, sheriffs, messengers, jurors, and all the great army of men whose service is necessary for the machinery of justice, and the product is disproportionate to the plant and the working force. There is no country in the world in which the doing of justice is burdened by such heavy overhead charges or in which so great a force is maintained for a given amount of litigation. The delays of litigation, the badly adjusted machinery, and the technicalities of procedure cause enormous waste of time on the part of witnesses and jury panels and parties. The ease with which admission to the Bar is secured in many jurisdictions and the attraction of a career which affords a living without manual labor has crowded the Bar with more lawyers than are necessary to do the business. Of the 114,000 lawyers in the United States according to the census of 1910, a very considerable part are not needed for the due administration of justice. If that business were conducted like the business of any great industrial or transportation company which is striving for the highest efficiency at the least cost in order to compete successfully with its rivals, a very considerable percentage of the 114,000 would be discharged. We at the Bar are not producers. We perform indeed a necessary service for the community; and to the extent of that necessary service we contribute towards the production of all wealth and the effectiveness of all energy in the community, and we take toll, rightly, from all the property and business in the community for the service. Superfluous lawyers, however, beyond the number necessary to do the law business of the country, are mere pensioners and drags upon the community and upon all sound economic principles ought to be set to some other useful work. There is plenty of work for them to do on the farms of the country.

Why is it that these defects exist in American administration of justice? The American people are not quarrelsome or litigious. They are good natured, practical, simple and direct in their methods of transacting their individual business, respecters of law, and honest in their dealings. Our Bar as a whole is courageous, loyal, and able. Our judges as a whole are just, high minded, and competent. Why do we transact the business of administering justice in such an unbusinesslike way? It is not difficult to point out particular laws and methods which are defective and to say that they ought to be changed; but there is still the question, how did they become defective, and why, after all our experience, do they continue defective?

I think the underlying cause of this defective administration of justice is that the Bar and the people of the country generally, proceed upon a false assumption as to their true relation to judicial proceedings. Unconsciously, we all treat the business of administering justice as something to be done for private benefit instead of treating it primarily as something to be done for the public service. The administration of law is affected by that same general attitude which I have mentioned, in which citizens think about what they are going to get out of their country instead of thinking of what they can contribute to their country. Our political system makes such an attitude on the part of the Bar very natural and easy. With our highly developed individualism, our respect for the sanctity of individual rights, our conception of government as designed to secure those rights, it is quite natural that lawyers employed to assert the rights of individual clients and loyally devoted to their clients' interest should acquire a habit of mind in which they think chiefly of the individual view of judicial procedure, and seldom of the public view of the same procedure. It is natural that the same habit of thought should be carried into our legislatures by the lawyers who make up the greater part of those bodies; and with our governments of narrow and strictly limited pow-

ers it is natural that there should be a continual pressure in the direction of promoting individual rights and privileges and opportunities and very little pressure to maintain the community's rights against the individual and to insist upon the individual's duties to the community. There are indeed two groups of men who consider the interests of the community. They are the teachers in the principal law schools and the judges on the Bench. With loyalty and sincere devotion they defend the public right to effective service; but against them is continually pressing the tendency of the Bar and the legislatures and, in a great degree of the public, towards the exclusively individual view.

The public tendency is exhibited at the very beginning of the whole business in permitting admissions to the Bar without adequate education and training. Few ideas have been more persistent throughout this country than the idea that the prevailing consideration in determining admission to the Bar should be that every young man is entitled to his chance to be a lawyer and that all requirements of attendance in offices and law schools and for difficult examinations are so many obstacles in the way of liberty and opportunity, defenses of aristocratic privilege and derogations from democratic right. The law schools have been slowly winning their way along the lines of better training for the Bar, but the progress is very slow and the pressure for brief and easy ways to get a license to practice is continuous. Only last year the Massachusetts legislature, by statute, reduced the requirements of school attendance for admission to the Bar to two years of evening high school, following upon an agitation carried on in support of the principle, "Let every man have his chance." One of our states, and a very great state indeed, with a very high average of general cultivation, permits any one of good moral character to practice law. Correspondence schools of law flourish, proceeding upon the idea that a

man can become a lawyer incidentally by reading law books in spare hours as he goes along with his ordinary occupation. The constant pressure of democratic assertion of individual rights is always towards reducing the difficulty of bar examinations. One consequence is the excess of lawyers that I have mentioned. Another consequence is that the efficiency of our courts is reduced, their rate of progress retarded, the expense increased, their procedure muddled and involved by an appreciable proportion of untrained and incompetent practitioners; by badly drawn, confused, obscure papers difficult to understand; by interlocutory proceedings which never ought to have been taken and proceedings rightly taken in the wrong way and inadequately presented; by vague and haphazard ideas as to rights and remedies; by ignorance of the principles upon which our law of evidence is based; by ignorance of what has been decided and what is open to argument; by waste of time with worthless evidence and useless dispute in the trial of causes; by superfluous motions and arguments and appeals; and by the correction of errors caused by the blunders of attorneys and counsel. In many jurisdictions there is a considerable percentage of the Bar whose practice causes the courts double time and labor because the practitioner is not properly trained to use the machinery furnished by the public for the protection of his clients. In the meantime other litigation waits and the public pays the expense. There is another evil arising from defective education. These half-trained practitioners have had little or no opportunity to become imbued with the true spirit of the profession. That is not the spirit of mere controversy, of mere gain, of mere individual success. To the student of the law, there come from Hortensius and Cicero, and Malesherbes and De Seze, and Erskine and Adams, from all the glorious history of the profession of advocacy, great traditions and ethical ideals and lofty conceptions of the honor and dignity of the profession, of courage and

loyalty for the maintenance of the law and the liberty that it guards. It is to a Bar inspired by these traditions, imbued with this spirit, not commercialized, not playing a sordid game, not cunning and subtle and technical or seeking unfair advantage—a Bar jealous of the honor of the profession and proud of its high calling for the maintenance of justice—that we must look for the effective administration of the law. The old customs under which the young law student was really guided and instructed in the law office of the established practitioner, under which the youth was impressed by the example and spirit and learning of his senior, are rapidly passing away. In the greater part of the country these customs no longer continue. The law school has taken the place of the law office except for acquiring the mere technique of practice, and the rights of the people of the United States to have an effective administration of the law require that the standards of the best law schools shall be applied to determine the right to membership in the Bar. When we compare our own method with the test of the three years' probation of the French Licentiate and the arduous four years' training of the German Refendar we may realize how little the American people have had in mind the protection and promotion of the public interest in requiring competency at the Bar.

No one can help sympathizing with the idea that every ambitious young American should have an opportunity to win fame and fortune. But that should not be the controlling consideration here. The controlling consideration should be the public service, and the right to win the rewards of the profession should be conditioned upon fitness to render the public service. No incompetent sailor is entitled to command a public ship; no incompetent engineer is entitled to construct a public work; no untrained lawyer is entitled to impair the efficiency of the great and costly machinery which the people of the country provide, not for the benefit of lawyers but for the adminstration of the law.

The same failure to realize that the Bar has public duties as well as privileges has affected the relations which American legislation has sought to establish between the Bar and the Bench in the conduct of the business of the courts. In the hearing and decision of causes in all their stages the judge represents the public interest; the lawyers in the case represent primarily their particular clients. It is the function of the judge to promote the will of the sovereign people that justice be done to all parties before him; to see to it that the facts are really ascertained; that the law is honestly applied; that unfair advantage is not taken; that witnesses are protected against improper treatment; that the public time is not wasted. On the other hand, it is the business of the lawyer to conduct a case so that his client will win. His relations to the case tend to give him a one-sided view of what is just and fair in that case. The ardor and stress of conflict are not favorable to abstract considerations of justice. He is concerned in exhibiting the facts which will help his client; in stating the law upon which his own side relies; in breaking down witnesses against him and strengthening witnesses in his favor. On each side counsel plays the game for all that it is worth, and sometimes superiority of counsel outweighs superiority of merit. Doubtless this contention, this struggle between the opposing sides of a case, is the best possible way in the long run to reach just results. But it is plain that in all the transaction the representative of public justice is the judge on the bench and that there is necessarily between him and the counsel on each side always a certain antagonism and contention. The natural tendencies of the American people emphasize this antagonism. We are restive under authority. We do not yield readily to discipline. We are unwilling to accept defeat. In every game we exaggerate the importance of success in comparison with all the rest of life. The restiveness of the Bar under the control of the judge on the bench finds its ex-

pression very widely in our legislation regarding procedure. That legislation is of course framed by the lawyers in our legislatures, and unconsciously, doubtless, their natural attitude of antagonism has led to a great multitude of provisions designed to protect the Bar against interference from the Bench.

The most striking illustration of this tendency is presented by the provisions found in many states, and quite recently urged upon Congress, prohibiting the judge from expressing any opinion to the jury upon questions of fact. From time immemorial it has been the duty of the court to instruct juries as to the law and advise them as to the facts. Why is it that by express statutory provision the only advice, the only clarifying opinion and explanation regarding the facts which stands any possible chance to be unprejudiced and fair in the trial of a cause. is excluded from the hearing of a jury? It is to make it certain that the individual advantage gained by having the more skillful lawyer shall not be taken away. It represents the individual's right to win if he can and negatives the public right to have justice done. It is to make litigation a mere sporting contest between lawyers and to prevent the referee from interfering in the game. The fact that such provisions can be established and maintained exhibits a democracy's tendency to yield support to the human interest of the individual as against the exercise of even its own power by its own representatives and for its own highest purposes.

Under the influence of the same disposition a large part of the detailed and specific legislative provisions regulating practice are really designed to enable law business to be carried on without calling for the exercise of discretion on the part of the court, and the evil results of the absurdly technical procedure which obtains in many states really come from intolerance of judicial control over the business of the courts. A clearer recognition of

the old idea that the state itself has an interest in judicial procedure for the promotion of justice, and a more complete and unrestricted control by the court over its own procedure would tend greatly to make the administration of justice more prompt, inexpensive and effective; and this recognition must come from the Bar itself.

The present condition of our law presents very strong reasons why lawyers should awake to a sense of responsibility for another and still more serious service which will require a Bar made strong by the application of stringent tests for admission, and by the best work of the best law schools in its training. The vast and continually increasing mass of reported decisions which afford authorities on almost every side of almost every question admonish us that by the mere following of precedent we should soon have no system of law at all, but the rule of the Turkish cadi who is expected to do in each case what seems to him to be right; and then the door would be thrown wide open for the rule of men rather than the rule of law, and for the exercise of personal injustice as well as personal justice. We are approaching a point where we shall run into confusion unless we adopt the simple and natural course of avoiding confusion by classification, system, the understanding and application of generally recognized and accepted legal principles. The slow development of the common law with its rich products of legal ideas and remedies has followed the lines of legal principles; but at all times the application of legal principles has been conditioned upon the customs from which the law has been evolved and to which the rules established have been applied. It is no slight task for discriminating intelligence to distinguish the principles which have been applied from the incidents of their application, arising from the social and industrial and political conditions of the day, involved in the multitude of reported cases that record the progress of the common law. Yet it is continually more important that the Bar

at large shall be trained to see through the precedents and the incidents to the controlling principles. A few men are already taking the lead in the work of classification—some, great teachers; some, great judges; some, great practitioners. But these few play only a small part in administering the law. Thousands of judges and tens of thousands of lawyers in all the cities and villages of this great country are doing that, and the problem of classifying and simplifying our law involves the need to carry to the great mass of them, present and future, a comprehension and discriminating understanding of the legal principles which form the thread of Ariadne for guidance through the labyrinth of decisions. How can that be done? Not by writing text books; the book stores swarm with them already. Not by preaching reform; nobody listens. Not by the imposition of a system to be accepted, as Continental Europe accepted the Roman law. No such system would be accepted. It would be ignored. All our instincts are against it. Some very able and public spirited lawyers have been for some years urging the organization of a definite and specific movement for the restatement of our law; for a new American Corpus Juris Civilis. They are quite right. It ought to be done. But who is to do it and how shall he be recognized as a prophet? Can we elect him by popular vote? Can we select him upon our own acquaintance with men of genius and self-devotion? No. Such a man or such a group of men must be the product of natural selection. They must be evolved by the conditions of life, and they must speak to an audience prepared to listen.

The only way to clarify and simplify our law as a whole is to reach the lawyer in the making and mold his habits of thought by adequate instruction and training so that when he comes to the Bar he will have learned to think not merely in terms of law but in terms of jurisprudence. The living principle of the case system of instruction in our law schools is that the student is required by a truly

scientific method of induction to extract the principle from the decision and to continually state and restate for himself a system of law evolved from its history. He is thus preparing not merely to accept formally dogmatic statements of principles but to receive and assimilate and make his own the systematic thought and learning of the world in the science of jurisprudence. With a Bar subjected generally to that process of instruction, the more general systematic study of jurisprudence would follow naturally and inevitably, and the influence of that study would be universal; and from that condition would evolve naturally the systematic restatement of our law, by men equal to that great work. Pour sand slowly upon the level ground; the conical pile produced will have a fixed relation between the area of its base and the height of the cone. It is so with human society. We must broaden knowledge and spirit to build up and we must build up to broaden.

To deal with American law as it is, however, is but half the problem. We are in the midst of a process of rapid change in the conditions to which the principles of law are to be applied, and if we are to have a consistent system that change must be met not at haphazard but by constructive development. The industrial and social changes of our time have been too swift for slowly forming custom. Old rules, applied to new conditions never dreamed of when the rules were stated, prove inadequate too suddenly for the courts readily to overtake them with application of the principles out of which the rules grew. We have only just begun to realize the transformation in industrial and social conditions produced by the wonderful inventions and discoveries of the past century. The vast increase of wealth resulting from the increased power of production is still in the first stages of the inevitable processes of distribution. The power of organization for the application of capital and labor in the broadest sense to production and commerce has materially changed the prac-

tical effect of the system of free contract to the protection of which our law has been largely addressed. The interdependence of modern life, extending not merely to the massed city community but to the farm and mine and isolated factory, which depend for their markets and their supplies upon far distant regions and upon complicated processes of transportation and exchange, has deprived the individual largely of his power of self-protection, and has opened new avenues through which, by means unknown to the ancient law, fatal injuries may be inflicted upon his rights, his property, his health, his liberty of action, his life itself. We have not yet worked out the *formulae* through which old principles are to be applied to these new conditions—the new forms perhaps through which the law shall continue to render its accustomed service to society. The arrival of new conditions to which the law must be adapted has its counterpart in the desuetude of old customs and the disappearance of the basis for old rules. The process of change in a nation's standards of conduct in life, which has made the Blue Laws of Connecticut a familiar evidence that laws once vigorous may die a natural death without repeal, is always going on. It is a part of the method by which the common law has developed. But that process seems to have been much accelerated in recent years. Take for example the community's standard of conduct as applied to the domestic relations, the change in the customary rights and duties recognized between parents and children, masters and servants, husbands and wives, the general relation between the sexes, which apparently is about to receive a new impulse towards change from the extension of women's work in Europe owing to the war.

These rapid changes of conditions to which the law has to be adapted furnish the chief reason why we are bombarded by such a multitude of statutes, good, bad, and indifferent, seeking to accomplish changes by express prohibitions, commands, and statutory remedies. This mass of

statutes proceeds from natural impulses to hasten the development of the law in its application to conditions which move too rapidly for customs to form. Many of them will be futile, many will be abandoned, many will be modified, many will prove to be valuable contributions to the development of the law, many will prove to have been steps in the wrong direction and to retard development. Taken altogether, they are themselves making customs from which the law of the future is being evolved.

Doubtless a large part of the irritation and prejudice against the courts in recent years has been due to the misunderstanding of those who in their impatience set the courts down as opposed to progress because they themselves do not realize that there has been a progressive development of our law to meet the new conditions, but that by the nature of the institution such development must follow and not precede the public conviction of its necessity.

There is one special field of law development which has manifestly become inevitable. We are entering upon the creation of a body of administrative law quite different in its machinery, its remedies, and its necessary safeguards from the old methods of regulation by specific statutes enforced by the courts. As any community passes from simple to complex conditions, the only way in which government can deal with the increased burdens thrown upon it is by the delegation of power to be exercised in detail by subordinate agents, subject to the control of general directions prescribed by superior authority. The necessities of our situation have already led to an extensive employment of that method. The Interstate Commerce Commission, the state public service commissions, the Federal Trade Commission, the powers of the Federal Reserve Board, the health departments of the states, and many other supervisory offices and agencies are familiar illustrations. Before these agencies the old doctrine prohibit-

ing the delegation of legislative power has virtually retired from the field and given up the fight. There will be no withdrawal from these experiments. We shall go on; we shall expand them, whether we approve theoretically or not, because such agencies furnish protection to rights and obstacles to wrongdoing which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation. Yet the powers that are committed to these regulating agencies, and which they must have to do their work, carry with them great and dangerous opportunities of oppression and wrong. If we are to continue a government of limited powers these agencies of regulation must themselves be regulated. The limits of their power over the citizen must be fixed and determined. The rights of the citizen against them must be made plain. A system of administrative law must be developed, and that with us is still in its infancy, crude and imperfect.

The development of our law under the conditions which I have pointed out will be accompanied by many possibilities of injurious error. There will be danger that progress will be diverted in one direction and another from lines really responsive to the needs of the people, really growing out of their life and adapted to their character and the genius of their institutions, and will be attempted along the lines of theory devised by fertile and ingenious minds for speedy reforms. Ardent spirits, awakened by circumstances to the recognition of abuses, under the influence of praiseworthy feeling, often desire to impose upon the community their own more advanced and perfect views for the conduct of life. The rapidity of change which characterizes our time is provocative of such proposals. The tremendous power of legislation, which is exercised so freely and with little consideration in our legislative bodies, lends itself readily to the accomplishment of such purposes. Sometimes such plans are of the highest value. More frequently

they are worthless and lead to wasted effort and abandonment. The test of their value is not to be found in the perfection of reason. Man is not a logical animal, and that is especially true of the people of the United States and the people of Great Britain, from whom our methods of thought and procedure were derived. The natural course for the development of our law and institutions does not follow the line of pure reason or the demands of scientific method. It is determined by the impulses, the immediate needs, the sympathies and passions, the idealism and selfishness, of all the vast multitude who are really from day to day building up their own law. No matter what legislatures and congresses and publicists and judges may do, the people are making their own law today as truly as in the earlier periods of the growth of the common law. No statute can ever long impose a law upon them which they do not assimilate. Whether repealed or not, it will be rejected and become a dead letter. No decision that is inconsistent with their growth can long resist the pressure to distinguish and overrule. What can be done, what must be done to make true and uninterrupted progress is that those members of the democracy to whom opportunity has brought instruction in the dynamics of law and self-government, shall so lead and direct the methods of development as to respond to the noblest impulses, the highest purposes, the most practical idealism, of this great law-making multitude, so that the growth of the law shall receive its impetus from the best and not from the worst forces of the community, and be guided by the wisdom and not the folly, the virtues and not the vices, of the people.

There will always be danger of seeking lines of law development which appear upon the surface to be progress but which are really an abandonment of progress. Long continued advance in this world in any useful direction is difficult and slow. Progress in self-government requires the self-governing people to apply rules of action to their

own conduct; to limit themselves by self-denying ordinances; to restrain their own impulses and cure their own faults. There must be many shortcomings in such an effort. It is a hard road to travel, and wearisome, and success must be long deferred. Human nature turns readily to any proposal of swift and easy reform which may relieve it of the burdensome task of self-control by the exercise of compulsion on some one else. That is not reform; it is surrender. Infinite harm may be done by such attempts and long wandering and confusion of effort may ensue; but if the people are to go on with the development of their free self-government they must ultimately come back to take up themselves the burden which they have sought to escape.

There will always be danger of developing our law along lines which will break down the carefully adjusted distribution of powers between the national and the state government. Upon the preservation of that balance, not necessarily in detail but in substance, depends, upon the one hand, the maintenance of our national power and, on the other hand, the preservation of that local self-government which in so vast a country is essential to real liberty. There is a continual tendency to restrict the exercise of national authority wherever it interferes with the local convenience or interest of a particular state or group of states; and, on the other hand, there is an equally persistent tendency to call in the exercise of national power to perform the duties of local government where states lack effectively organized power or wish to be spared expense or see an opportunity to get money out of the national treasury for local use, or where some portions of the country wish to impose their ideas on the remainder of the country. The same states that are unwilling to give the national judiciary jurisdiction to enforce the protection of aliens promised in national treaties or to permit a national force of citizen soldiery to be commanded by officers appointed by the national executive instead of militia

officers appointed by the governors of the states, will urge Congress to pass sumptuary laws controlling the private life and conduct of affairs in local communities and will hand over to the national government strictly local regulations for the sake of an appropriation. Powers thus conferred under special motives and for special purposes to not revert. They are continued. And if the process goes on our local governments will grow weaker and the central government stronger in control of local affairs until local government is dominated from Washington by the votes of distant majorities indifferent to local customs and needs. When that time comes the freedom of adjustment which preserves both national power and local liberty in our system, will be destroyed and the breaking up of the Union will inevitably follow.

More critical still is the danger of too great a reaction from the system of free contract upon which our government has long been developing—a reaction which will destroy the basis of individual liberty upon which our institutions rest. We are in the midst of a reaction now. It was inevitable. The individualism which was the formula of reform in the early nineteenth century was democracy's reaction against the law and custom that made the status to which men were born the controlling factor in their lives. It was an assertion of each freeman's right to order his own life according to his own pleasure and power, unrestrained by those class limitations which had long determined individual status. The instrument through which democracy was to exercise its newly asserted power was freedom of individual contract, and the method by which the world's work was to be carried on in lieu of class subjection and class domination was to be the give and take of industrial demand and supply. Now, however, the power of organization has massed both capital and labor in such vast operations that in many directions, affecting great bodies of people, the right of contract can no longer be at

once individual and free. In the great massed industries the free give and take of industrial demand and supply does not apply to the individual. Nor does the right of free contract protect the individual under those conditions of complicated interdependence which make so large a part of the community dependent for their food, their clothing, their health and means of continuing life itself, upon the service of a multitude of people with whom they have no direct relations whatever, contract or otherwise. Accordingly, democracy turns again to government to furnish by law the protection which the individual can no longer secure through his freedom of contract and to compel the vast multitude on whose co-operation all of us are dependent to do their necessary part in the life of the community. Plainly, in some directions and to some extent such governmental control is necessary; but we should not forget that every increase of governmental power to control the conduct of life is to some extent a surrender of individual freedom and a step backwards towards that social condition in which men's lives are determined by status rather than by their own free will. We should be careful that in promoting the efficiency of government we do it by the just application and not by the surrender of the true principles upon which our government is founded. Let me state the case in its simplest terms: The central principle of our system of government is in the proposition that every man has a right to full and complete individual liberty, limited only by the equal liberty of every other man. From that right all others are deduced; the right to life, to property, to the pursuit of happiness, are its corollaries. Our whole system of law is in its essence only the enforcement of the reciprocal limitations of individual liberty. It is a compulsion upon me to limit my liberty by yours and upon you to limit your liberty by mine. The justification of all laws and customs which constrain human conduct is that they are necessary and appropriate for the preservation of the

liberty of others. Whatever law passes beyond that limit and seeks to impose upon the individual the ideas of others as to what his conduct should be, whether to subserve the interest of others or to conform to their prejudices or to their ideas of propriety or wisdom, even though those others may constitute an overwhelming majority of the whole community, is a violation of the principles upon which our government was formed; is not the just exercise of governmental power, but is essential tyranny. The test is difficult of application. The incidence and the ultimate effect of law are often indirect and obscure. They depend upon a multitude of conditions imperfectly known and subject to controversy. The highest intelligence and the broadest knowledge are needed for the application of the test; but upon a sincere and unremitting effort that it shall be applied in every step of the development of our law depends the question whether that development shall destroy or shall deepen and strengthen the foundations of our free government.

What part is the Bar to play in this great work of the coming years? Can we satisfy our patriotism and be content with our service to our country by devoting all our learning and experience and knowledge of the working of the law and of our institutions solely to the benefit of individual clients in particular cases? During all our mature lives, in many courts and upon many occasions we have been asserting rights, protecting property, preserving liberty, by appeals to the law, to the great rules of right conduct written into our constitutions; protesting against the abuse of official power, extolling justice, pleading for loyalty to our free institutions. Haven't we meant it? Has it all been mere talk for the purpose of winning cases? Have we never really cared about law and justice except as available instruments to get particular clients out of trouble? Is the Bar doing its duty and playing its part in the development of the law? As a rule the leaders of the

Bar devote themselves to their individual practice. As a rule the younger and least experienced lawyers make up the state legislatures. There are exceptions, bnt that is the rule. Even in the National Congress, although the average of ability and strength is much higher than the public seems to suppose, comparatively few lawyers of the first order make their appearance. The questions involved in the development of the law are seldom adapted to interest an audience in political discussion. The real consideration and discussion and the mature conclusions worthy to be followed must be among the practitioners, the judges, the teachers of the law. The fitness of a people for self-government is measured by their capacity to set up and maintain institutions through which government can be carried on effectively, and responsibly. That rule applies to all large bodies of free agents having a common purpose. It applies to the 114,000 lawyers of the United States. We must have institutions through which our duty can be done if it is to be done. In response to that necessity came the Associations of the Bar—the six hundred local and state associations and this great national organization. Here is at hand an institution for the public service of the profession of the law. To enlarge its membership, to improve its procedure, to increase its scope and efficacy, to strengthen its authority and its appeal in the real life of our time—these are steps by which the lawyers of all the states may rise to the high level of patriotic duty and a dignity of service worthy of a true American Bar.

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